



Appeals

What CAFL Trial Counsel
Needs to Know

CAFL Appellate Panel Support Unit

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APPEALS: WHAT CAFL TRIAL COUNSEL NEEDS TO KNOW

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HAVE QUESTIONS? CONTACT THE CAFL APPELLATE PANEL SUPPORT UNIT

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<https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/>

Appeal of a final judgment

Right to appeal, even if appeal would be meritless/frivolous

A parent or child aggrieved by a final judgment in a child welfare case has the right to appeal. An appeal of a final judgment is reviewed by a three-judge panel of the Appeals Court. The party appealing – parent, child, or other – does not have to have a “meritorious” claim. If the client wants to appeal, file the notice of appeal, even if you disagree. The appellate attorney will talk to trial counsel about possible issues to raise in the appeal.

What is a final decision?

A final judgment is one that finally determine someone’s rights. Final judgments in a child welfare case might be:

- Termination of parental rights
- A permanent custody or other adjudication of a child in need of care and protection under G.L. c. 119, § 26 (even though the parties continue to litigate in the trial court)
- Permanent guardianship
- § 29B permanency hearing determinations or orders
- The court’s order striking a party
- The court’s order denying a non-party’s motion to intervene

Orders during the course of the case regarding the 72-hour hearing, reasonable efforts motions, motions for a finding of DCF’s “abuse of discretion”, are interlocutory; they are appealed as single justice petitions (see below).

Single justice petitions: appealing an interlocutory order

What are interlocutory orders?

Orders prior to the final disposition in a case are interlocutory. Parties can seek review from a Single Justice of the Appeals Court under G.L. c. 231, § 118. Single justice petitions must be filed within 30 days of entry of the adverse order on the trial court docket. That deadline is statutory and cannot be extended. That is, you cannot file a motion asking for more time, and a trial judge cannot generously give you more time. On the 31st day, the petition is late and will be denied.

What are some common interlocutory orders that might be reviewed by a Single Justice? Orders:

- Awarding temporary custody following the 72-hour hearing
- Denying a motion for visitation
- Determining whether DCF made reasonable efforts
- Granting temporary guardianship
- Denying a request for disability accommodations
- Denying (or granting) an “abuse of discretion” challenge to DCF decisions
- Placing a child out of state under the ICPC

Who files single justice petitions?

You can file one as trial counsel. Or, if you do not have time (or you feel uneasy about doing it), you can reach out to the CAFL Appellate Panel Support Unit and request that appellate counsel be assigned. Appellate counsel can either mentor you and help you file the petition or take over representation just for purposes of filing the single justice petition.

Do clients have a right to single justice review?

Unlike an appeal of a final judgment (see above), there is no right to single justice review of an interlocutory order. Trial counsel and appellate counsel should be screening for a “meritorious” issue. “Meritorious” does not mean a “winner”; it means a claim worthy of appellate review with at least an arguable claim. Of course, if the client wishes to file a single justice appeal even though you can find no meritorious issue, you may choose to file it for purposes of client relations. Feel free to call CAFL administration to discuss your options.

For more information on single justice relief, and to find the forms to seek appellate counsel, please visit the CAFL Single Justice Practice page on our website: <https://www.publiccounsel.net/cafl/professional/single-justice-practice/>

Initiating an appeal

Advising the client

Advise your client of their right to appeal an adverse final judgment in a child welfare case. The client might want to challenge every adverse aspect of the judgment or only one part of it, such as an order denying post-adoption contact, the decision to approve DCF’s adoption plan, or an order for sibling visits. A notice of appeal does not need to challenge every aspect of the judgment. But, just in case the client changes their mind later, the notice of appeal should indicate that the client is appealing the “trial court’s judgment dated X”; this will preserve their rights to challenge every aspect of the judgment.

Timeline of the appeal

How long do appeals take?

Most take 12-18 months. After you file the notice of appeal, the trial judge will issue findings. You’ll also have to make sure the clerk’s office has ordered a transcript. These two items – findings and transcripts – cause the longest delays in an appeal. You may have to help appellate counsel “nudge” the judge to issue the findings. And you will certainly have to help appellate counsel ensure that all necessary transcripts are ordered and made by the transcriber.

When the judge finishes the findings and the transcriber finishes the transcripts, the appeal is ready to be “assembled” by the trial court clerk’s office. At this point, the clerk will send to counsel a Notice of Assembly of the Record. If you receive this notice, please tell appellate counsel immediately. The trial court clerk’s office doesn’t actually send the findings or transcripts to the Appeals Court; it sends just the Notice of Assembly itself and some other paperwork. Appellate counsel will provide the findings and transcript to the Appeals Court along with the initial brief.

The appellant – the party filing the appeal – has 14 days from issuance of the Notice of Assembly of the Record to “docket” the appeal. Docketing the appeal means entering it in the Appeals Court. To enter it, the appellant must either pay a docketing fee (which indigent clients don’t have to pay) or have the docketing fee waived by the Appeals Court. To waive the docketing fee, appellate counsel must submit a parent client’s current affidavit of indigency. (To waive the docketing fee for an appellant-child, appellate counsel needs to file a Motion to Waive the Docketing Fee.) Sometimes it is difficult for appellate counsel to locate the client and get a signed affidavit of indigency within this 14-day window, and trial counsel will have to help appellate counsel.

Once the appeal is docketed, the appellant has 40 days to file their brief. The appellate attorney often asks for extensions, and the Appeals Court almost always grants them (but often the briefing deadline extensions are not very long). The appellee – the party seeking to maintain the trial court’s judgment – has 30 days to file a responsive brief. Again, counsel often asks for extra time, and the Appeals Court almost always grants it. After the appellees file their briefs (DCF is almost always an appellee), the appellant has 14 days to file a reply brief.

After the case is fully briefed, the appeal will be assigned to a panel of three Appeals Court judges. They will read the briefs and hear oral argument, which is usually scheduled for about two or three months after the last brief is filed. You are welcome to attend oral argument! After oral argument, the judges consider the case and usually issue a decision within a few months. Most decisions out of the Appeals Court are unpublished, but a handful each year are published.

A party who loses at the Appeals Court has 21 days to seek further appellate review in the Supreme Judicial Court (SJC). The SJC only accepts about 2% of further appellate review applications. If they deny the application, the case is over. If the SJC accepts the application, the parties may re-brief the case.

What to file to Initiate an Appeal

To initiate an appeal, you must file the following documents in the Juvenile Court or the Probate and Family Court:

- Notice of Appeal
- Motion for Appointment of Appellate Counsel
- Motion for Fees and Costs Related to the Appeal
- Motion for a Stay (maybe)¹

Send all of these documents to the CAFL Appellate Panel Support Unit, along with the CAFL “Appellate Assignment Intake Form,” found on the [CAFL Website](#).

<https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/>

Email a completed Appellate Assignment Intake Form to Anarris@publiccounsel.net. Please be sure to include any important information about the case or the client that you think appellate counsel will want to know (the client doesn’t speak English, the client is homeless, the clients’ foster parents are distrustful and discourage contact with counsel, and so on). CAFL will appoint certified appellate counsel and send notice to all attorneys of record.

¹ These days, DCF does not push the adoption pending appeals. DCF will often stipulate on the record that it will not seek adoption while the appeal is pending. If so, there is no need to file a motion for stay (or to get an order if you have already filed one). If you do require a stay for any reason – sometimes DCF caves under pressure from anxious pre-adoptive parents, or private agencies will push for adoption in the Probate and Family Court – contact the CAFL Appellate Panel Support Unit and we can help.

Please note that we need all of these documents in order to assign appellate counsel, and we usually assign appellate counsel within a few days to two weeks of receiving them. If you have filed an appeal but you haven't heard from appellate counsel within a few weeks, we may not have your paperwork. Call us at 617-910-5746.

Notice of appeal

Timing and Signature. An aggrieved party has 30 days to file a notice of appeal by right. The 30 days runs from the date the decision is entered on the trial court's docket. See "Late Notice of Appeal," below.

An appellant-parent must sign the notice of appeal. By rule, the trial court clerk's office can (and will) reject a notice of appeal not signed by the parent client. Appellant-child clients do not have to sign the notice of appeal; counsel can sign it on behalf of a child client. Each appellant must file their own notice of appeal. One party cannot "glom onto" the appeal of another. If the client wants to challenge *any* aspect of the judgment, file a notice of appeal.

Late Notice of Appeal. If your client does not file a timely notice of appeal within 30 days of the docketing of the judgment, there may be an opportunity to file a late notice of appeal.

Late notices of appeal are not available where the appeal period is statutory. So, for example, under G.L. c. 119, § 27, a notice of appeal of a permanent custody adjudication must be filed within 30 days. Similarly a permanency hearing order must be appealed within 30 days under G.L. c. 119, § 29B. You cannot ask for more time, and the trial judge can't give you more time. But if the appeal period is governed by the Rules of Appellate Procedure – which it is for termination decrees and permanent guardianship decrees – then the Rules permit a request to appeal late.

So how do you get permission to file a late notice of appeal? Late notices of appeal are generally allowed if the party shows "excusable neglect." Mass. R. App. P. 4(c). Excusable neglect means more than just the attorney or client forgot or got confused or was too busy. Fortunately, the trial courts and Appeals Court single justice are generally sensitive to the fact that our parent clients are often hard to reach to sign a notice of appeal within 30 days; they may be incarcerated out of state, homeless, or suffering from untreated mental health conditions. Judges are likely to find excusable neglect if the attorney has difficulty tracking down a client for one of these reasons.

Where do you file the motion?

- If the appeal period has not run yet – that is, you are still within the 30 days but you know that you will not get the notice of appeal signed and filed on time – ask the trial court for permission to file late.
- If you are between 1-30 days late – that is, between 31-60 days after final judgment – you can ask the trial judge *or* a single justice of the Appeals Court to file late. (If the trial judge denies your motion, you *can* have a second bite at the apple and ask an Appeals Court single justice to file the late notice of appeal.)
- If you are more than 30 days late – that is, more than 60 days after final judgment – you must ask the Appeals Court single justice.
- If you are more than a year after judgment, you are out of luck.

Moving to file a late notice of appeal in the Appeals Court is not difficult, but it might be outside of your comfort zone. If so, please reach out to the CAFL Appellate Panel Support Unit and we can give you a mentor or assign the motion to an appellate attorney.

Sample motions and pleadings can be found on the [CAFL Appellate Tools and Resources Website](https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/).
<https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/>

Ordering the transcript

The trial court clerk's office is responsible for ordering the transcript for child welfare appeals. This includes the clerk's offices of the Probate and Family Court! *See* Mass. R. App. P. 1(c) & 8(b)(2). The Juvenile Court clerks are familiar with this process, but sometimes clerks in the Probate and Family Court (who handle appeals in non-child welfare cases, too) get confused. Follow up with the clerk's office – particularly in the Probate and Family Court – to see if they need anything from you, as trial counsel.

Clerks often order transcripts only of the trial dates. If there was an important hearing date – a motion in limine hearing, a voir dire hearing, a hearing date regarding an important visitation or placement motion, or a hearing at which important procedural decisions of some kind were made – be sure to request the transcript from that hearing, too. Appellate counsel might not realize that they need it until many months have gone by, and by then it might be too late.

If you receive the transcripts, contact appellate counsel to ensure that they, too, got a copy.

After the appeal is filed

Working with appellate counsel

Do not withdraw from the case or close your NAC, even if you represent a parent whose rights have been terminated. You are still responsible for any necessary trial court advocacy, and you must help appellate counsel find the client and gather documents for the appeal. In addition, there may be post-judgment motions to file or settlement negotiations. Appellate counsel might also ask you to file motions urging the trial judge to issue their findings faster. Trial counsel and appellate counsel should collaborate. For most motions in the trial court, it doesn't matter whether trial or appellate counsel files them, so long as both lawyers are on the same page about the client's goals. (Many judges insist that only one lawyer appear and argue a trial motion; that is up to trial and appellate counsel to determine. Behind the scenes, both can work on the motion and deal with the client, witnesses, etc.)

Trial counsel for a child client – appellant or appellee – continues to represent the client in all trial proceedings, including review and redetermination, permanency hearings, sibling visitation motions, etc. until the child is either adopted or returns home.

Please send the appellate attorney the client's file upon request. The Board of Bar Overseers has explained that the "file" belongs to the client, not the lawyer (except for billing records), so please be sure to send appellate counsel *everything*, including notes. Appellate counsel will work with you to make this file transfer as painless as possible. Many appellate lawyers are willing to take the original files from you, copy the files themselves, and send the originals back to you.

Appellate counsel will need to get from you the client's contact information. They are likely to ask you to share your thoughts about the case. Please return appellate counsel's calls promptly.

Conflict between trial and appellate counsel

Occasionally conflicts arise between trial counsel and appellate counsel. Most conflicts can be resolved between counsel, keeping the interest of the client in mind.

But sometimes conflicts are harder to resolve. Perhaps trial and appellate counsel disagree on the child client's position. For example, trial counsel is substituting judgment but appellate counsel is client-directed. Or both counsel are substituting judgment but reach different conclusions. In such cases, contact CAFL administration. We can try to help you reach a consensus. If that isn't possible, sometimes both trial and appellate counsel must withdraw and we appoint a single lawyer who is both trial and appellate certified to take over.

Or perhaps appellate counsel raises an ineffective assistance of counsel claim. In such circumstances, trial counsel should withdraw. Trial counsel should contact CAFL to learn what they should and should not do in such circumstances. We have a lot of materials to send in order to help trial counsel feel more comfortable in this awkward situation.

If the conflict is a disagreement over getting documents or dockets at the trial court, over who will negotiate and draft settlement papers, or who will file a motion for relief from judgment, please contact the CAFL Trial Panel Support Unit or Appellate Panel Support Unit. We may be able to help mediate.

What happens if your client wins on appeal?

A win on appeal can mean different things. The Appeals Court can remand for a new trial or further evidence on a limited issue. Or it can remand and order the trial judge to make additional findings. It is prudent to advise a client that a win on appeal almost never means that the children come home. At best, it usually means that they will get a new trial. Accordingly, they should prepare for that new trial by continuing with services, keeping notes about important meetings or conversations, and attending any offered visits. If the client has disappeared, a remand for a new trial is a hollow victory.

If the client wins on appeal, you can reopen your NAC or ask the trial court clerk for a new NAC.

What happens if your clients loses the appeal?

If the Appeals Court affirms the trial judge's decision, the appellant has 21 days to seek further appellate review (FAR) in the Supreme Judicial Court. FAR is granted in only 1-2% of cases. The SJC usually decides whether or not to accept the case on FAR within a couple of months.

Preserving issues at trial

Waiver

Generally, any issue not raised in the trial court is waived and cannot be raised for the first time on appeal. There are some exceptions for fundamental due process errors and errors that counsel did not know about (or the improper striking of counsel), but those are rare. Accordingly, preserving issues is crucial (see below).

Objections, proffers, & motions

To preserve an issue for appeal, you must:

Object to inadmissible evidence (including improper questions from judges)

Move to strike improper answers from witnesses

Make an offer of proof (explaining what evidence would have been offered had you been allowed to ask about it and elicit that evidence)

File substantive motions (about visits, services, accommodations, interpreters, etc. If you don't argue about it and make it an issue for the trial court judge – early, when the judge might be able to do something about it – it isn't preserved for appeal)

File procedural motions (including motions to recuse as soon as the judge's problematic actions or statements come to light).

Avoid lobby conferences and any sidebars that are “off the record.” If an important objection or argument is made, or factual information disclosed by counsel, during your off the record discussion, ask for permission to put that on the record when you return to the courtroom. Or if something improper occurs off the record, when you return to the hearing make a summary statement of what took place off the record. For example, if the judge exhibits bias, or reveals an ex parte conversation, during an off-the-record lobby conference or sidebar, you must put that information on the record and immediately move to recuse the judge.

Feel free to contact the Trial Panel Support Unit or the Appellate Panel Support Unit if you have questions. We can help you preserve the issue for appeal. .

Consulting appellate counsel to set up issues on appeal

Feeling overwhelmed with a tricky issue, like child sexual abuse hearsay, competency, battling experts, or judicial bias? Have a novel issue of law? Do you “know” deep in your heart that you are going to lose and you want help setting up a good appeal? In some cases we can appoint appellate counsel pre-trial to help you argue, preserve, and set up your appeal. Contact the CAFL Appellate Panel Support Unit and request appellate counsel. We are here to help you, even before you file the appeal!